IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:: O R D E R ::

S.B. CIVIL WRIT PETITION NO. 439/1996

Dr. S.C. Mathur
Vs.
The State of Rajasthan and Ors.

DATE OF ORDER :: 10th AUGUST, 2007

PRESENT

HON'BLE MR. BHANWAROO KHAN, J.

Reportable

Mr. Kuldeep Mathur, for the petitioner.
Mr. O.P. Rathi, Deputy Government Advocate.

The facts of the writ petition in brief are that the petitioner was initially appointed on 7.2.1967 to the post of Civil Assistant Surgeon in the respondent Department. The date of birth of the petitioner is mentioned as 1.10.1940. In normal course, he was to retire w.e.f. 30.9.1998, but on 29.12.1994, he submitted an application before respondent No.3 for seeking voluntary retirement to be effective from 31.3.1995, on which date when he did not receive information from respondents he relinquished the charge of the post of Medical Officer, but later on the department on 29.5.1995 informed to the petitioner that his notice for seeking voluntary retirement was not addressed to the appointing authority, therefore, it was not a legal notice in the eye of law. The petitioner was directed

that in case he wants to voluntary retire, the notice should have been given to the appointing authority and he was directed to take charge. In compliance thereof, he joined the duty on 7.6.1995. After joining the duty, he was promoted as Deputy Director, Zone Jaipur to which post he joined on 17.6.1995 and on the same day, he submitted three months' notice for seeking voluntary retirement for the post of Deputy Director w.e.f. 30.9.1995. A reminder was also sent to the department on 16.9.1995 to retire him on 30.9.1995. After expiry of period of notice, he relinquished the charge from the post of Deputy Director, Medical and Health Services, but the respondents sent him a communication alongwith letter informing him that his voluntary retirement cannot be accepted under Rule 244 (1) of the Rajasthan Service Rules, 1951 (for short 'the Rules of 1951' hereinafter) because of serious complaints pending with the Lokayukat, Jaipur and the petitioner was asked to join the duty on the post of Deputy Director immediately. The communication dtd. 29.9.1995 and telegram dated 1.10.1995 sent by the respondents are illegal because he has already relinquished his charge on the post of Deputy Director on 30.9.1995, so he prayed to quash the letter dtd. 29.9.1995 and telegram dtd. 1.10.1995.

A reply to the writ petition has been filed on behalf of the respondents. After admitting the factual aspect for seeking voluntary retirement of

the petitioner it has been submitted that respondents department have taken a decision on 20.9.1995 not to accept the voluntary retirement notice submitted by the petitioner under Rule 244(1) of the Rules of 1951 as there was serious complaints pending with the Lokayukt and the departmental enquiry was under contemplation against him. The decision not to retire the petitioner voluntarily, had already been taken on 20.9.1995, before expiry of period of notice of the petitioner seeking voluntary retirement, but the petitioner failed to join the service inspite of letter sent to him. Since serious complaints were pending in the department, the Department was contemplating to initiate disciplinary proceedings against the petitioner and had requested him to join the duty which he failed to do. Thus, the decision not to retire him voluntarily is proper and legal.

Heard learned counsel for the parties.

Learned counsel pleaded that as per requirement of Rule 244 of the Rules of 1951, he gave three months' notice for voluntary retirement and has relinquished the charge of the post after expiry of period of notice on 30.9.1995. Till date no communication whatsoever was sent to him. Mere pendency of complaints is not a ground to refuse voluntary retirement. Any decision, if taken, and remains with the respondents but not communicated to

the petitioner is of no consequence. As per Rule 244 of the Rules of 1951, it was mandatory for the department that before expiry of period of notice for voluntary retirement, the communication for withholding the voluntary retirement should have been communicated to the petitioner which the respondent failed and after relinquishing the charge, the respondents cannot ask him to join the duty again. So no communication whatsoever has been received by the petitioner asking him not to relinquish the charge. The disciplinary action whatever has been initiated against him is only after the petitioner stood retired voluntarily and therefore, no pensionary or consequential benefits can be withheld by the respondents.

On the other hand, the learned counsel for the respondents pleaded that the decision not to retire the petitioner had already been taken on 20.9.1995 and the communication of such decision was sent to the petitioner well before time of expiry of notice and the departmental enquiry has already been initiated against him. So till the departmental proceedings is concluded, the petitioner is not entitled for pensionary benefits and inspite of the respondents' request to join the duty, the petitioner did not join the duty.

Rule 244 of the Rajasthan Service Rules, 1951

provides for voluntary retirement from government service. So far as relevant, the rule runs as under :-

> "244(1). Optional Retirement on Completion of 20 years qualifying service. -- (a) A Government servant may, after giving at least 3 month's previous notice in writing to the Appointing Authority, retire from service on the date on which he completes 20 years of qualifying service or attains the age of 45 years whichever is earlier or any date thereafter to be specified in the notice :
>
> Provided that it shall be open to the Appointing Authority to withhold permission to retire a Government servant :
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> (i)who is under suspension;
>
> (ii)in whose / case disciplinary proceedings are pending or contemplated for the imposition of a major penalty and the disciplinary authority having regard to the circumstances of the case is of the view that such disciplinary proceedings might result in imposition of the penalty of removal or dismissal from service;
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> (iii)in whose case prosecution is contemplated or may have been launched in a court of law;
>
> (b) A Government servant who has given notice for seeking retirement under clause (a) of this sub-rule, may

> presume acceptance of the notice of retirement and the retirement shall be effective in terms of the notice automatically unless an order in writing to the contrary has been issued by the Competent Authority and served upon the Government servant before the expiry of the period of the notice."

On the plain reading of the rule, it would appear that the request of the government servant to voluntarily retire after completing the qualifying service or attaining the qualifying age is not binding on the Government and in situations contemplated in clauses (i), (ii) or (iii) of the proviso, the appointing authority may reject the request. The submission of notice for seeking voluntary retirement can be termed as an offer and the respondents have right to reject the voluntary retirement request. In case any of the situation contemplated in the above cases exists, the respondents have to indicate or sent the communication of its decision to the petitioner well before expiry of period of notice. The fact that the government servant if under suspension or is facing enquiry or proceedings are contemplated against him exists, the request for seeking voluntary retirement can be turned down but it does not mean that the Government can withhold its decision. The respondents may withhold the permission, but it cannot withhold the decision. The discretion of withholding

the permission is entirely with the respondents but the decision of not to retire voluntarily has to be taken and be communicated before expiry of period of notice.

The point is no more res-integra as would be evident from the decision of the Hon'ble Supreme Court in the case of B.J. Shelat Vs. State of Gujarat & Ors. (1978) 2 SCC 202, wherein the Supreme Court had occasion to consider an identical provision in Rule 161 of the Bombay Civil Service Rules, 1959. Clause (ii) of sub-rule (2) of rule 161 laid down as under-

> "Any Government servant to whom clause (a) applies may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service... and in any other case, after he has attained the age of 55 years.
>
> Provided that it shall be open to the appointing authority to withhold permission to retire to a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-clause."

Construing scope of the rule the Court observed :-

> "The words "It shall be open to the appointing authority to withhold permission" would indicate that the appointing authority has got an option to withhold permission and that could be exercised by communicating its intention to withhold permission to the Government servant."
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> xxx xxx xxx xxx xxx
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> "For the proviso to become operative it is necessary that the Government should not only take a decision but communicate it to the Government servant. It is not necessary that the communication should reach the Government servant."
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> xxx xxx xxx xxx xxx
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> "On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds specified in the proviso."

In the instant case, the petitioner, who was present in the office on 30.9.1995 had relinquished the charge of the office on the same date after expiry of period of notice given by him, but he never received any communication or decision for withholding the request of voluntary retirement. As per Rule 244 of the Rules of 1951, voluntary retirement automatically comes into force after expiry of period of notice but if permission is to be refused then

there must be a communication before expiry of period of notice for seeking voluntary retirement. The respondents have taken decision on 20.9.1995 not to retire the petitioner, but the same was never communicated to the petitioner before expiry of period of notice. He was very much present in office on 30.9.1995, but no communication was given to him. The telegram which is alleged to have been sent to the petitioner bears the date 1.10.1995 which clearly shows that till 30.9.1995 there was neither any rejection of permission to retire nor any communication to withhold the voluntary retirement of the petitioner. The decision whatever taken by the respondent was never communicated to the petitioner before expiry of period of notice i.e. 30.9.1995. The respondents if wanted to communicate for withholding the permission of voluntary retirement of the petitioner, they could have done it on the same day i.e. 30.9.1995 when the petitioner was present in the office and was relinquishing the charge of the post, but neither any decision of contemplating the departmental enquiry or withholding the permission for voluntary retirement was communicated to the petitioner. Whatever communication took place is after expiry of period of notice for voluntary retirement, the day on which the period of notice expired. The petitioner had relinquished his charge and thereafter if any communication is sent, this will not effect the voluntary retirement which had already

taken place after expiry of notice of voluntary retirement.

In the above premises, the petitioner has been deemed to have retired on the expiry of period of notice for seeking voluntary retirement as per provisions of the Rules and as provided therein the department has failed to communicate the petitioner about that refusal before expiry of period of notice.

In the result the writ petition succeeds and is allowed and the letter dated 29.9.1995 (Annex.-11) and telegram dated 1.10.1995 (Annex.-12) are quashed. The prayer of interest for the period of withholding voluntary retirement benefit also be given, is rejected. The petitioner is held entitled for all pensionary benefits subject to the decision of departmental enquiry pending against him. There shall be no order as to costs.

(BHANWAROO KHAN)J.

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